

Background of the Madonna Home Depot Enforcement Case

In February 1999, Mr. Madonna applied for a US Army Corps of Engineers (Corps) permit to fill waters of the United States in a tributary to Froom Creek and adjacent wetlands (wetlands) as part of a development project to build a Home Depot along Los Osos Valley Road in San Luis Obispo, California. His original permit application would have caused the loss of well over 3 acres of wetlands. As such, his proposal would require processing of a standard individual permit including circulation of a 30-day public notice, proof that the development couldn't be moved or modified to avoid or reduce impacts to wetlands (an alternatives analysis, and preparation of an Environmental Assessment (EA) to comply with the National Environmental Policy Act. Mr. Madonna decided to revise his plans to ensure that less than 3 acres of wetlands would be lost. By doing this, Mr. Madonna's project would qualify for a streamlined permit known as a "nationwide permit" (NWP). NWPs do not require public notice, an alternatives analysis, or preparation of an EA.

In November 1999, Mr. Madonna was granted a NWP permit to fill 2.93 acres of wetlands. Complaints by local citizens alerted the Corps in February of 2001 that work had begun. A site visit on March 1, 2001 confirmed that grading had been nearly completed, that significantly more than 2.93 acres of jurisdictional areas had been filled, and that the permittee had not complied with several of the permit special conditions.

On March 14, 2001, the Corps Regulatory staff met with Mr. Madonna and his representatives at the project site, described the nature of the violations, and handed Mr. Madonna a letter signed by the Corps District Engineer suspending the permit.

During March and April of 2001, Mr. Madonna's representatives attempted to offer mitigation measures as a means of resolving the enforcement case. The District Engineer deemed these offers inadequate.

On April 23, 2001 anonymous calls were made to the Corps reporting that Madonna Construction had commenced work on widening of Los Osos Valley Road. A site visit the next day confirmed this and the fact that additional work (subsequent to the permit suspension) had occurred on the Home Depot site.

On May 4, 2001, the Corps District Engineer revoked Mr. Madonna's permit and the enforcement case was referred to the Environmental Protection Agency (EPA). EPA attempted but was unable to reach a settlement agreement with Mr. Madonna.

On August 28, 2001, Mr. Madonna filed a complaint against the Corps alleging violations of the Administrative Procedures Act (APA) in suspending and revoking his permit.

On September 3, 2001 Mr. Madonna submitted a permit application for widening of Los Osos Valley Road needed for access to the Home Depot site.

On September 6, 2001 at a court hearing, the Government was ordered to reinstate Mr. Madonna's permit. The judge determined the Corps had not adequately followed its regulations outlining the procedure for suspending and revoking permits. However, the decision had no bearing on the ability of the Government to pursue an enforcement case against Mr. Madonna for non-

compliance with his permit and for other unauthorized activities in wetlands.

On December 6, 2001 Mr. Madonna amended his complaint, alleging the Corps was violating the Administrative Procedures Act for refusing process his application to widen Los Osos Valley Road. The Corps had determined that the widening of the Los Osos Valley Road was really part of the Home Depot development project and that illegal work had already begun on the road that had adversely affected wetland areas. Thus, the Corps took the position that processing and evaluation of the permit application to widen Los Osos Valley Road would not begin until all the outstanding enforcement issues had been resolved.

On December 28, 2001 the Government filed suit against Mr. Madonna.

On January 14, 2002 there was a hearing associated with Mr. Madonna's suit against the Corps. The judge did not grant Mr. Madonna's request to force the Corps to initiate processing of his permit application to widen Los Osos Valley Road. Subsequently, Mr. Madonna's representatives pledged to work with the Corps to produce sufficient off-site wetland mitigation to resolve the violation quickly. The Corps agreed to work with Mr. Madonna's consultants to finalize the mitigation plan and work on a consent decree.

Between February and May 2002, Corps Regulatory staff made a number of site visits to San Luis Obispo to work out the details of the mitigation plan. Tentative approval on the mitigation plan was reached pending submission of the actual engineering plans for the habitat creation areas. Meanwhile, Department of Justice attorneys coordinated with Madonna's attorneys to finalize a proposed consent decree (settlement) to resolve the Clean Water Act violations and to end both the Government's suit against Madonna and Madonna's suit against the Government. This proposed settlement was agreed to by both sides and filed with the federal court on Monday June 24, 2002.

The Corps has begun processing the Los Osos Valley Road Widening permit application.